No. 83-301

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALASKA LUMBER & PULP COMPANY, INC.,
an Alaska corporation,

Petitioner,

v.

REID BROTHERS LOGGING COMPANY
an Alaska corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The petition for a writ of certiorari filed by Alaska Lumber & Pulp Company, Inc. ("ALP") is without merit and should be denied. ALP has incorporated by reference the arguments made in the petition for certiorari filed by its co-defendant in the same case, Ketchikan Pulp Company ("KPC"), cause No. 83-307 in this court, and KPC similarly has incorporated ALP's arguments. Accordingly, Reid Brothers Logging Company ("Reid Brothers"), the respondent herein, submits this brief in opposition to be read together with its brief in opposition to the related petition. For the sake of clarity, respondent's brief opposing KPC's petition in cause No. 83-307 should be read first and this brief should be read second. The abbreviations used herein are the same as those used in respondent's brief in No. 83-307 (see footnote 1 therein).

SUMMARY OF ARGUMENT

This summary condenses the responses to petitioners' arguments herein and in the companion petition, No. 83-307.

The defendants' argument that the district court and court of appeals found that they had conspired in violation of Sherman Act §§ 1 and 2 "based solely upon (1) a variety of legitimate business and personal contacts, plus (2) similar but not consciously parallel conduct" is untenable. The conspiracy in fact was proved by abundant evidence both direct and circumstantial; it was carried out by a combination of explicit communications between the defendants and consciously interdependent action; and it employed a variety of methods of destroying competition. Standard antitrust conspiracy law was applied by the district court and the court of appeals.

The petitioners' argument over standards for "predatory pricing" is not even raised by the record. This is a conspiracy case, not a single-actor attempt-to-monopolize case such as those relied upon by defendants. As part of their conspiracy the defendant pulp mills bid preclusively on timber sales, each in its collusively-set "operating area," to keep out would-be competitors for logs.

It was not necessary to allege or show any mathematical relationship between defendants' costs and the amounts of their bids where the bidding to exclude other mills was part and parcel of a horizontal conspiracy to restrain trade and monopolize.

The argument that KPC's offer to Reid Brothers was "better-than-competitive" is not only over a question of fact, unsuitable for review by this Court, but is utterly specious. The offer in fact was far worse than what respondent would have experienced in a market free of defendants' collusive trade restraints because it embodied a flat three-year price which deprived the seller of periodic price increases which, under competitive conditions, would have resulted from rising end product values. The court of appeals has correctly affirmed

the district court's finding that, but for the defendants' antitrust violations, Reid Brothers would have logged the Muddy River No. 3 sale as a purchase logger selling to one or more buyers at prices fluctuating periodically with end product values.

The argument that the statute of limitations was not observed is plainly incorrect in light of the well-established rule that evidence predating the limitations period is admissible to show the origin and nature of the conspiracy. The defendants committed injury-causing acts within the limitations period, and plaintiff was properly awarded as damages the difference between what it actually experienced in its dealings with KPC and what it would have experienced but for the defendants' antitrust violations.

The defendant KPC expressly stipulated in open court to a bench trial of this case several weeks before the trial began. Both defendants had repeatedly moved to strike plaintiff's jury demand, requested a trial to the court even after the Reid Brothers case was designated to be tried separately, and even argued that a jury trial would deprive them of due process of law. The district court correctly ruled that ALP had not relied upon plaintiff's jury demand, which was withdrawn in order to obtain a trial date under conditions of calendar congestion, and that both defendants had waived any claim to a trial by jury. The court of appeals has correctly affirmed on the basis of established law that the right to a trial by jury is not absolute but may be waived expressly or by conduct.

ARGUMENT

A. KPC And ALP Attained And Exercised Monopoly Power In The Timber Industry In Southeast Alaska

The evidence clearly established that the defendant pulp mills, in addition to having conspired in restraint of trade in violation of Section One of the Sherman Act, 15 U.S.C. § 1,[1]

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[1] See respondent's brief in opposition to the petition in No. 83-307.

had violated Section Two of the Act, 15 U.S.C. § 2, by conspiring and attempting to monopolize, and actually monopolizing, parts of trade and commerce. The district court found (FF XIII, C.1-4):

> 1. The defendants attained and exercised monopoly power, that is, the power to set prices and exclude competitors in the timber industry in Southeast Alaska.
>
> 2. The defendants' attainment of monopoly power resulted from their collusive use of their position as pulp mills to exclude and extinguish all competition for logs and to eliminate competition between themselves.
>
> 3. The defendants exercised their monopolistic power to set prices by paying loggers artificially low administered prices for logs and logging services, rather than prices based on supply and demand.
>
> 4. The defendants' monopoly power was unlawfully attained and was unlawfully exercised to the injury of non-defendant mills and loggers in Southeastern Alaska.

The evidence shows clearly that the relevant geographic market is Southeast Alaska. (ER 733-34, 1816-17.) There is no dispute over the relevant product markets: The purchase and sale of standing timber, the purchase and sale of cut logs, the purchase and sale of logging services, and the milling and sale of manufactured products in Southeast Alaska. (ER 734-35, 1817-18.)

Over the period 1959-75, KPC and ALP combined became the purchasers of over 90 percent of the timber being cut in Southeast Alaska, and the manufacturers of at least 90 percent of the manufactured products. (ER 735.) The 90 percent share was divided about equally between them. (ER 735; FF XIII.B.1.) The evidence is overwhelming, and practically uncontradicted, that KPC and ALP attained and exercised monopoly power, that is, the power to set prices and exclude competitors in Southeast Alaska. (ER 733-39, 1816-32.) KPC's expert, Mr. Rickard, admitted as much. (RT 32:1538.)

The monopoly power clearly resulted from the defendants' collusive use of their power as pulp mills to extinguish all

competition for logs from sawmills and to eliminate competition between themselves. Defendants' purposeful exclusion of other mills and systematic acquisition and control of competitors, while expanding their own facilities, cannot be justified as "integration"; where integration is natural it is not necessary for manufacturers to take purposeful steps to force competitors out or deny them a supply. (ER 736.)

The defendants exercised their monopolistic power to set prices by paying loggers artificially low administered prices rather than prices based on supply and demand. (ER 714-26, 737-38.) Here again, the applicable standard was admitted by one of defendants' economists on cross-examination. (ER 736-37.) There was no connection between the defendant-imposed prices and the end-product values which normally would be the main factor in determining log values. (ER 714-26, 737-8.) KPC's power to control the log price is admitted in its own documents (SER 132, emphasis added):

> *Ketchikan Pulp Company controls the market price for purchased logs* and has maintained the same price over a ten-year period except for absorbing towing costs averaging $3 per thousand board feet. . . .

The testimony of Mr. Wiener, a recently retired high official of the Forest Service, that the cost-plus contract device "would deprive the logger of any benefits of his having purchased the timber," and is "a luxury that only applies in areas where there are limits on competition," stands uncontradicted. (ER 738.) So does the evidence that in the defendants' administration of the Southeast Alaska market, it was cost accounting, not supply and demand or end-product values, that KPC and ALP used in dictating the manipulative prices they would pay.

The defendants also deliberately attained and exercised the power to exclude competitors in milling and logging. *See* respondent's brief in opposition in No. 83-307. As stated by KPC's timber manager (ER 738):

> The possibility of purchasing more logs is most remote since practically all the loggers in Southeastern Alaska are

financed and controlled by the mills and the mill controlling the timber sales gets the logs.

It is well settled that monopoly power is the power to control prices or exclude competition, *Greyhound Computer Corp.* v. *Int'l Business Machines Corp.*, 559 F.2d 488, 496 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978), and that the offense of monopolization under Section 2 consists of (1) the possession of monopoly power in the relevant market, (2) willful acquisition or maintenance of that power, and (3) causal antitrust injury. *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966); *California Computer Products* v. *Int'l Business Machines Corp.*, 613 F.2d 727, 735 (9th Cir. 1979).

The existence of monopoly power must be measured against a geographic market and a product market. *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951); *Walker Dist. Co.* v. *Lucky Lager Brewing Co.*, 323 F.2d 1, 9 (9th Cir. 1963), *cert. denied*, 385 U.S. 976 (1966). The relevant geographic market may be national or may consist of areas as small as single city, town, or metropolitan area. *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962); *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947). Since the statute prohibits monopolization of "any part" of commerce, market definitions vary with the industry, *Greyhound Computer Corp.* v. *Int'l Business Machines Corp.*, *supra*, 559 F.2d at 494 (9th Cir. 1977), and present "a question of fact in each case." *E.g.*, *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 369 F.2d 449, 456 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 384 (1967), *reh. denied*, 390 U.S. 930 (1968). *Accord*, *Telex Corp.* v. *International Bus. Mach. Corp.*, 510 F.2d 894, 915 (10th Cir. 1975), *petition for cert. dismissed*, 423 U.S. 802 (1975) ("[F]indings on this subject are not to be overturned unless clearly erroneous.").

Section 2 of the Sherman Act proscribes, as a distinct offense, conspiracies to monopolize any part of commerce. This prohibits a combination of two or more entities to obtain monopoly-type control in a relevant market. *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 465 (1921); *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 293 (6th Cir. 1898),

affirmed, 175 U.S. 211 (1899). The rules defining "conspiracy," and its provability by circumstantial evidence, are the same as with Section 1 offenses, *supra*. The elements of a Section 2 conspiracy are the participation of two or more persons, a specific intent to monopolize, and one or more overt acts directed toward achieving a monopoly. *American Tobacco* v. *United States*, 328 U.S. 781 (1946). The defendants' intent may be inferred from the surrounding facts and circumstances. *Times Picayune Pub. Co.* v. *United States*, 345 U.S. 594 (1953); *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *Alles Corp.* v. *Senco Products, Inc.*, 329 F.2d 567 (6th Cir. 1964).

KPC and ALP concertedly achieved and exercised monopoly power, *i.e.*, committed the offense of monopolization. Nonetheless they are also guilty of the related offense of *attempt* to monopolize under Section 2 of the Sherman Act. *Greyhound Computer Corp.* v. *Int'l Business Machines Corp.*, *supra*, 559 F.2d at 504 (9th Cir. 1977); *Hunt-Wesson Foods* v. *Ragu Foods*, 627 F.2d 919, 926 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981).

As is often true in antitrust litigation, the same conduct by defendants which violated Section 1, prohibiting combinations and conspiracies in restraint of trade, also violated Section 2, prohibiting monopolies and conspiracies and attempts to monopolize. *See, e.g.*, *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946); *United States* v. *Paramount Pictures*, 334 U.S. 131 (1948); *Washington State Bowling Proprietors Ass'n* v. *Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir. 1966), *cert. denied*, 384 U.S. 963.

The law condemns with equal vigor the sole monopolist and the group which deliberately acquires and exercises monopoly power. *American Tobacco Co.* v. *United States*, *supra*; *International Boxing Club of New York, Inc.* v. *United States*, 358 U.S. 242 (1959).

The defendants have argued that their monopoly power was "thrust upon" them by their position as the only two pulp mills

in Southeast Alaska. The argument is untenable. (ER 1823-28). The "thrust upon" defense has no application where monopoly power was attained or kept through exclusionary practices, territorial allocations, price-fixing, or the like. 3 von Kalinowski, *Antitrust Laws and Trade Regulation* § 9.03[1]. Even where a high degree of market power has been acquired without misconduct, the use of that advantage to foreclose competition, gain a competitive advantage, or destroy competition, is unlawful. *United States* v. *Griffith*, 334 U.S. 100 (1948); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 274 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). Moreover, a firm violates Section 2 "by using its monopoly power in one market to gain a competitive advantage in another." *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, *supra*, at 275; *Greyhound Computer Corp.* v. *Int'l Business Machines Corp.*, *supra*, 559 F.2d at 503 (9th Cir. 1977). Here, the defendants were not entitled to use their economic power as pulp mills to destroy competition in sawmilling, logging, and other parts of the industry.

B. The Evidence Supports The Judgment As To Damages, And Petitioners' Arguments Relating To The Fact Of Damage Are Devoid Of Merit

Petitioners' arguments concerning damages are based on the false statement that KPC's offer to Reid Brothers for its log production was "better than competitive." In fact the offer was at a level below the logger's costs of production and was far worse than what a competitive-market offer would have been because it was for a flat three-year price which deprived the logger of the periodic price increases which normally would occur in a competitive market as end product values went up. The district court and court of appeals correctly held that this type of long-term flat-rate contract was imposed upon loggers by the defendant pulp mills pursuant to their conspiracy to restrain trade. Such contracts had the purpose and effect of keeping loggers under the mills' control while minimizing procurement costs. Reid Brothers was injured because its

financial experience on the Muddy River No. 3 logging sale was far worse than it would have been but for the impact on the market of the defendants' conspiracy in restraint of trade and monopolization. The district court's finding of damage was conservative and was reached by the standard methods of determining causation and measuring the amount of damage.

1. **Law governing fact of damage.** It is manifest that the purposes and effects of the defendants' violations were to eliminate the competition of, and thereby injure, independent loggers and would-be mill operators. "When a log market is restrained, as the Southeast Alaska market was by the defendants' anticompetitive conduct," the district court has found, "the result is injury to the log suppliers." (FF XV.A.1.) The issue, then, is whether Reid Brothers qualifies under Section 4 of the Clayton Act, 15 U.S.C. § 15, as a "person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . ." Clearly the answer is affirmative.

Private antitrust actions are a means mandated by Congress to enforce the antitrust laws for the public benefit as well as to compensate the victims of violations. *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co., supra*, 381 U.S. 311, 318 (1965); *Zenith Radio Corp.* v. *Hazeltine Research, Inc., supra*, 395 U.S. 100, 130-31 (1969). This Court has long held that the fact of damage, like any other fact, may be established as a matter of just and reasonable inference from the evidence. *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). Thus, where a plaintiff proves an injury, and a violation by defendants of the antitrust laws of such a nature as to be likely to cause that type of injury, the trier of fact must be permitted to draw from this circumstantial evidence the inference that the necessary causal relation exists. *Continental Ore Co.* v. *Union Carbide Corp., supra*, 370 U.S. 690, 697 (1962); *Zenith Radio Corp.* v. *Hazeltine Research, Inc., supra*, 395 U.S. at 149; *Pacific Coast Agr. Export Ass'n* v. *Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975). *See also*

United States v. *Champion Int'l Corp.*, 1979-2 CCH Trade Cases ¶ 62,862 (D. Ore. 1979), at 78,993.

The plaintiff is entitled to recover its lost net profits not only on sales which did occur but also on sales which did not occur but would have been made in an unrestrained market. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, *supra*, 395 U.S. 100, 149 (1969); *Ford Motor Co.* v. *Webster's Auto Sales, Inc.*, 361 F.2d 874, 877 (1st Cir. 1966). Lost future profits are an established item of damage, *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459, 464-65 (9th Cir. 1964), *cert. denied*, 377 U.S. 993 (1964), and are recoverable regardless of whether or not the plaintiff remained in the impacted business throughout the damage period, *Twentieth Century-Fox Film Corp.* v. *Brookside Theatre Corp.*, 194 F.2d 846 (8th Cir. 1952), *cert. denied*, 343 U.S. 942 (1952).

None of the cases cited by petitioners in any way diminishes the foregoing rules.

ALP's argument that it was not involved in the Muddy River dealings between KPC and Reid Brothers is unavailing. A conspirator is liable for the acts of his co-conspirators committeed in carrying out the unlawful combination. *Beltz Travel Service* v. *Int'l Air Transport Ass'n*, 620 F.2d 1360, 1367 (9th Cir. 1980); *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.*, 138 F.2d 967 (7th Cir. 1943), *cert. denied*, 321 U.S. 792 (1944). It is not necessary that each defendant take part in each act or transaction, or know the identity and function of all the alleged co-conspirators. A participant is liable although he may have knowledge of, or participate in, only one or a few acts in furtherance of the conspiracy. *Esco Corp.* v. *United States*, 340 F.2d 1000 (9th Cir. 1965); *Beltz Travel Service* v. *Int'l Air Transport Ass'n*, *supra*, 620 F.2d at 1367 (9th Cir. 1980).

Where the plaintiff is a seller injured by a price-depressing conspiracy of buyers, there is no requirement that privity exist between the parties, nor that the plaintiff be a purchaser, seller, or competitor in relation to a particular defendant. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar*

Co., 334 U.S. 219 (1948). A defendant who participates in a conspiracy must "share responsibility for the resulting damage, including that occasioned by activities in which it did not directly participate, or from which it did not directly benefit." *Twentiety-Century Fox Film Corp.* v. *Goldwyn*, 328 F.2d 190, 212 (9th Cir. 1964). *See also Karseal Corp.* v. *Richfield Oil Corp.*, *supra*, 221 F.2d 358 (9th Cir. 1955); *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.*, *supra*, 138 F.2d 967 (7th Cir. 1943), *cert. denied*, 321 U.S. 792 (1944).

2. Competitive log prices would reflect end product values. "The price paid by a mill to a purchase logger in a competitive market," the district court has found, "is determined by the forces of supply and demand." (FF XV.A.15.) All of the evidence in point, including both sides' expert testimony, showed that competitive log prices fluctuate with the market values of the end products produced by the mills. (ER 740-41.) As end product prices rise, competing mills pay more for logs. The court has found: "In an unrestrained market, a significant percentage of end-product price increases would be 'passed through' the mills to the log owners (*e.g.*, purchase loggers)." (FF XV.A.13.) In 1972-74, the exact period when Reid Brothers was logging its Muddy River No. 3 timber sale, and a serious shortage of logs existed, the values of pulp and cants soared and the defendant mills obtained enormous profits. (ER 635-40, 741-49.) But for the defendants' collusive restraints on the market the result would have been substantially increased log prices, affording Reid Brothers a profit.

3. KPC's flat-price, three-year offer was an exercise of defendants' monopoly power and an act pursuant to their conspiracy in restraint of trade. The court has found that in competitive markets the "pass-through" of end product price increases to log suppliers "is accomplished by periodic (*e.g.*, annual) price increases in the contracts by which mills purchase their supply." (FF XV.A.13, ALP App. A-65.) Specifi-

cally with regard to Reid Brothers the court has found (FF XV.A.7):

> 7. In an unrestrained market, contractual log prices between Reid Brothers (as a purchase logger) and KPC (or other log buyer) would have been renegotiated on at least an annual basis.

These findings are fully supported by the evidence and refute defendants' argument that KPC's three-year, flat-price offer of 1972 was "better-than-competitive."[2] In fact, KPC's offer was thoroughly anticompetitive and exemplified the defendants' ironclad administered pricing system. (ER 755-58, 1860-61.) As the district court found (FF XV.A.10, ALP App. A-64):

> 10. Upon making these adjustments [to convert a "cove" price to a "millpond" price], it appears that KPC's price offer fell considerably below the prices which a purchase logger in an unrestrained market could have commanded between 1972 and 1974. This differential is primarily attributable to defendants' conduct in artificially restraining the log prices paid by mills.

In a competitive market the contract between a purchase logger and a mill would not call for a fixed price over the entire term of a multi-year logging show; instead, buyers and sellers would adopt contracts allowing them to revise prices periodically. (ER 755-56.) In the Pacific Northwest, described as a

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[2] KPC's citation of *Standard Oil Co. v. United States*, 337 U.S. 293 (1949), as having recognized "that even multi-year requirements and output contracts can have legitimate business purposes" is misplaced. The Court there noted that the great majority of the requirements contracts at issue were year-to-year arrangements, terminable at six-month intervals upon thirty days' written notice. *Id.* at 296. Moreover, the Court noted that important considerations in evaluating the anti-competitive impact of requirements contracts were the length of the contracts relative to the requirements of the industry, and the market power of the defendant. *Id.* at 308-309. In no way did the Court imply approval of multi-year contracts such as the one at issue herein, and surely not where such contracts are imposed pursuant to a collusive trade restraint.

competitive market by defendants themselves, the buyers and sellers adjusted prices on a periodic basis ranging from daily to yearly. (ER 755.) Even in Southeast Alaska, when the defendants were sellers rather than buyers the sales contracts provided that the prices would be renegotiated periodically or as often as necessary to reflect changing values. (ER 756.)

However, when Mr. Reid approached KPC to sell logs, defendant responded with a single-price offer for the entire sale even though all concerned knew the project would take three logging seasons and substantial cutting could not begin until 1973. (ER 757.) Mr. Finney of KPC has admitted that the $64 price would have prevailed through the entire sale regardless of end product prices and log value increases (except for minor adjustments given in KPC's sole discretion for such items as wage increases). (ER 757-761.)

Even by 1972 standards KPC knew it was offering less than log values justified. KPC and G-P were making substantial profits on their Alaska operations in the spring of 1972. (ER 757.) In arriving at the $64 camp run price, Mr. Finney computed the average log value to KPC (based on end product prices including sales at artificially low levels to the parent company FMC) at $98/MBF, and calculated a 32% profit for KPC on Reid's logs, more than double the Forest Service's assumed profit ratio for mills. (ER 757.) The upward trend in 1972 was known to large companies such as KPC and ALP. The soaring 1972-74 log prices in the Pacific Northwest clearly show that log prices have no difficulty tracking end product values when competition is present. (ER 779; Ex. 1397, SER 271.)

Defendants argue that Mr. Reid asked for a quotation for the "whole production," but even under Mr. Finney's version there is no evidence that Reid asked for a flat figure at which he would have to sell his logs regardless of increases in their value over three years of logging—which is what KPC imposed upon him. What Mr. Reid asked for was simply a price. His desire was to sell on a season-by-season or raft-by-raft basis; he had sold on both bases in the past. (ER 752, 1860-61.) In a free

market a price quote by the pulp mill—whether directed to the "whole production" or not—would have provided for periodic review and adjustment, seasonally or perhaps quarterly. Neither party, in the presence of competition, would be able to impose on the other a flat multi-season price. (ER 1861.)

Mr. and Mrs. Reid did not expect to able to make money on the Muddy River sale at $64 per thousand. (ER 758.) They had to count on future "bonuses" which could be given at the discretion of KPC. (ER 758.) KPC's offer, translated into a $73.81 "mill pond" price,[3] fell $8.28/MBF below what the court has found to be logging costs in 1973 and $17.89/MBF below costs in 1974. (FF XV.A.19, ER 2447.) Compared to the prices which would have prevailed but for defendants' antitrust violations, KPC's offer was $32.10/MBF below the unrestrained market level for 1973 and $49.62 below for 1974. (FF XV.A.15-19, ER 2447.)

The Reids valued their twenty-five year history as independent purchase loggers and planned to log the Muddy River No. 3 sale in that capacity. (ER 752.) However, by the time they

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[3] To KPC's $64/MBF is added $9.81/MBF representing towing and other costs paid by the mill which in an unrestrained market would be paid by the purchase logger. (Ex. A-4137, SER 292.) The defendants paid such costs in lieu of increasing reported log prices in order to avoid stumpage increases. (ER 723-24.) KPC argues that an additional $1.37/MBF should be added because of the court's finding that the price conversion should include an allowance for "profit and risk" on the assumed cost items. (FF XV.A.9.) However, such allowance is already inherent in most of the cost figures on KPC's books (for towing and scaling, for example) because the services were performed by third party contractors; the logger would pay the third parties no more than the defendants paid them. The defendants' expert upon whose analysis the court relied in part did not add a "profit and risk" factor on mill-borne cost items in his computation of a market price. (Ex. A-4137, SER 278.) $73.81 is thus a reasonable equivalent "mill pond" price. Even at the $75.18 figure defendants urge, however, it is obvious that KPC's offer was far below competitive levels.

purchased the sale the competition that had been struggling to enter the market had been crushed by the defendants' conspiracy and monopolization. (FF IX and X.) Alaska Prince, which had bought logs from Reid Brothers, had been put out of business by defendants' antitrust violations. (FF X.A.10.) Mr. Reid's recollection was that he met with Mr. Rynearson of ALP before the Muddy River bidding and offered to sell logs to ALP if he became the successful bidder. (ER 756.) It is certain that ALP, although it was concerned about running out of logs, knew that Reid Brothers was the successful bidder on the Muddy River sale, and would enjoy an easy tow from the sale site to the WLC mill, made no approach of any kind to Reid Brothers to try to buy logs. (ER 756-57.) Schnabel Lumber Company, a "captive" of ALP, *supra*, offered $63/MBF for Reid Brothers' logs, but the conversation between Messrs. Schnabel and Reid ended abruptly when Mr. Reid mentioned an old towing bill which was still owing from Schnabel. (ER 757.)

The market was devoid of competitive prices. KPC's action in offering Reid Brothers only an artificially low single price for the entire Muddy River No. 3 production was an exercise of defendants' monopoly power and an act pursuant to their ongoing conspiracy in restraint of trade.

4. KPC's requirement that Reid Brothers surrender ownership of the timber sale was a further act pursuant to the combination and conspiracy, and an exercise of monopoly power. The defendants argue that "RBLC's entire claim for injury is based on its transfer of ownership of a timber sale, the Muddy River No. 3 sale, to KPC in 1972." (KPC Petition, p. 7). They repeatedly made the same argument to the trial court and the court of appeals. However, their assertion is incorrect. What damaged Reid Brothers was the defendants' unlawful destruction of competition in the market. Purchase loggers *never* received competitive prices, based on supply and demand and reflecting end product values, from the defendants during the conspiracy period. Instead they were paid only the artificially low administered prices which kept them under

defendants' control. If Reid Brothers had logged the entire Muddy River No. 3 sale as a purchase logger, and had never transferred ownership of the timber sale to KPC, its damages would be virtually identical to the amount found by the court. (ER 761.) The defendants' conspiracy and monopolization stifled competition throughout the years 1972-73, when plaintiff was logging, and 1974, when it would have been logging, *supra*. KPC's appropration of the Muddy River sale, while not essential to plaintiff's recovery, was symptomatic of defendants' market control. The court has found that "[h]ad the market in Southeastern Alaska not been artificially restrained by defendants, Reid Brothers would not have agreed to log Muddy River No. 3 as a contract logger for KPC." (FF XV.A.11.)

Reid Brothers needed only about $65,000 for startup expenses. (ER 758, 1857-58.)[4] In a competitive market mills seeking to purchase logs would advance startup money, such as that needed by plaintiff, without requiring that the logger surrender the sale to them. Here again, the unlawful destruc-

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[4] A logging tower and second truck would not have been needed until 1973, at which time they could have been leased. (ER 758.) KPC's argument that it "advanced" hundreds of thousands to Reid Brothers is untenable. (ER 1857-58.) There was no "advance" at all concerning the tower; it was leased by KPC to plaintiff at $2/MBF, which the mill collected in 1972 although the tower did not arrive until 1973. The payments for logs were for logs actually rafted, (*i.e.*, work completed) and for road-building were for roads actually completed. These items and the truck payments were deducted from log settlements due to Reid Brothers. (ER 760, 1857-58.) The log credits due Reid Brothers nearly equaled the total advances and payments according to the final accounting even though KPC wrongfully terminated Reid Brothers after it had completed the expensive steps of moving in, preparing the site, and building roads, and before it could begin logging the easier and more productive part of the sale. (ER 764, 787, 1858.) The company's payment of bills, about which defendants complain, included logging debts as well as gravel debts, and included payment in both categories to suppliers whose continued business was necessary for the current logging work. (ER 1858.)

tion of Alaska Prince was directly connected to plaintiff's damages. Alaska Prince, while still a competitor, advanced substantial startup money without requiring a third-party agreement or other concessions. (ER 758-59.) Even the defendants had historically advanced startup funds without requiring a transfer of the sale. (ER 759.) In the presence of competition price offers for 1973-74 logs would have related economically to end product values, and Reid Brothers could have started in 1972 with a contract subject to periodic price adjustment (as it had with Alaska Prince on an earlier sale, ER 750). It could also have waited until 1973 to start the project at higher prices—it had until 1977 to complete the logging under its contract with the Forest Service (Ex. 126)—but that would have been pointless in view of the defendants' collusive destruction of free market prices.

Mr. Reid told KPC that the $64 price quoted was "way too low." (ER 759.) There was discussion of KPC's providing the use of a tower and a second truck, and making road advances to be repaid out of log proceeds. (ER 760.) A few days later, Mr. Finney flew to Petersburg with documents for the Reids to sign. These included a detailed logging contract and a third-party agreement. After the deductions which KPC would make, the payments to Reid Brothers would be about $38/MBF net. (ER 760.)

KPC's contention that it required the third-party agreement as "security" for the startup money it advanced cannot stand the light of day. If KPC had really wanted security it would not have had to strip Reid of ownership of the sale to get it. The applicable Department of Agriculture regulation and Forest Service Manual provisions specifically authorized the creation of security interests in timber sale contracts and even provided a form to be used. The defendant could have advanced the funds on the security of logs to be provided, with Reid Brothers keeping its status as a purchase logger. Reid Brothers owed nothing to KPC, and KPC had never written off any indebtedness from Reid Brothers. (ER 760.)

Thus, KPC's requirement of the third-party agreement was a further anticompetitive act which would not have been carried out but for the defendants' conspiracy and monopolization. The court has properly found that but for the defendants' antitrust violations Reid Brothers would not have been a contract logger for KPC. (FF XV.A.11.)

The district court found that in an unrestrained market Reid Brothers could have obtained the necessary start-up financing to log at Muddy River, and that KPC eventually breached its contract with respondent. Since neither of these findings is raised in the petitions for certiorari, they need not be discussed herein.

5. **Amount of damages.** Reid Brothers' damages equal the difference between what it actually received, and what it would have received in a market unrestrained by the defendants' Sherman Act violations. The revenues and costs found by the district court in assessing damages are as follows:

	1972	1973	1974	Total
Revenues	45,977	1,051,003	1,014,858	2,111,838
Costs	46,631	814,604	753,976	1,615,211
Profit or (Loss)	(654)	236,399	260,882	496,627

The per-MBF figures implicit in the findings are as follows:

	1972	1973	1974
Revenues	70.03	105.91	123.43
Costs	71.03	82.09	91.70

(FF XV.A.15-19; Ex. A-4137, SER 278.)

These findings reflected a conservative approach by the court to measuring damages. The district court noted that it was "not adopting wholesale the testimony of any expert by either side" regarding damages. (ER 2410.) The finding on lost revenue reflects the district judge's determination based on all the evidence. The defendants have not argued over the amount of damage, as distinguished from the fact of damage, in their petitions to this Court; it should be noted, however, that this Court has long held that in computing damages in antitrust cases that justice and public policy require that the wrongdoer

shall bear the risk of the uncertainty which his own wrong created. *Bigelow* v. *RKO Radio Pictures, Inc.*, 337 U.S. 251, 265 (1946). The trier of fact may thus fix the amount of damages by estimate. *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, *supra*, 395 U.S. at 113-14 n.9, 123-25.

6. Lost profits for 1973-74 are properly measured by what actually happened in the market. Defendants also argue that the profits Reid Brothers lost in 1973-74 should be measured not by what actually happened in the market in those seasons but by what the parties might have guessed would happen at the time KPC obtained the third-party agreement from Reid Brothers in 1972. This argument was properly rejected by the district court both before and after the trial. (ER 1864; SER 65-69.) Reid Brothers was entitled to recover the lost profits it would have earned but for the defendants' antitrust violations. As the district court ruled before trial, "[p]laintiff can elect to recover those lost profits it would have received had plaintiff logged the entire Muddy River operation as a purchase logger. . . ." (SER 68.) The damages are the loss of operating profits, not the deprivation of an "asset." As noted above, plaintiff would have the same antitrust claim had it logged not only in parts of 1972 and 1973, as it actually did, but throughout those years and in 1974 as well.

In measuring the damages the court looks to the best evidence available—and wherever possible bases them on what actually occurred in the market. *See Twentieth Century-Fox Film Corp.* v. *Brookside Theatre Corp.*, 194 F.2d 846 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952).[5]

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[5] There is no case from any jurisdiction which would support defendants' argument. The dicta in *Standard Oil Co. of California* v. *Moore*, 251 F.2d 188 (9th Cir. 1957), cited by defendants, did not speak at all to the recovery of lost profits, only to the distinct subject of good will valuation. In the context of lost profits, the *Moore* dicta

7. The defendants here committed injury-causing overt acts within the four-year period, but proof of such acts is not a prerequisite to recovery. The district court found an ongoing conspiracy with numerous overt acts by both defendants committed pursuant to it through and including 1975. The court of appeals noted that "the evidence clearly shows the continuing existence of the conspiracy through at least 1975," and that there was "substantial evidence of sustained illegal activity during the limitations period." 699 F.2d at 1305-06. The evidence clearly established that the defendants committed several injury-causing overt acts against Reid Brothers during the damages years 1972-1974. For example, KPC destroyed Alaska Prince which was buying logs from plaintiff; ALP refrained from making any offer for plaintiff's Muddy River No. 3 logs; KPC made Reid Brothers only a single-price three-year offer at an artificially low level; KPC required that Reid Brothers surrender the Muddy River sale to it as a condition of advancing startup money; and both defendants continued all aspects of their unlawful conspiracy and monopolization which wiped competition for logs out of the market.

The question which petitioners purport to bring before the Court—"[w]hether the courts below erred in finding defendants liable under the antitrust laws based on evidence of alleged conduct well outside the four-year statute of limitations period"—simply does not exist on this record. The evidence and findings plainly show an unlawful conspiracy and monopolization starting in earlier years and continuing through the damages period, with overt acts carried out

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have been rejected. *Lehrman* v. *Gulf Oil Corp.*, 500 F.2d 659, 670 (5th Cir. 1974). *Farmington Dowel Products Co.* v. *Forster Mfg. Co.*, 421 F.2d 61 (1st Cir. 1969) merely held that the plaintiff could recover lost past profits plus lost future profits or going concern value, but not both of the latter two, and that on the facts of that case an estimate of future profits over a ten-year span was speculative; it did *not* hold that profits for any historical period should be measured by anything other than actual market statistics for that period.

against the plaintiff in the four-year period before the action was filed.

Reid Brothers' proof more than complied with the requirements of the law. Where the plaintiff is a seller whose receipts have been lessened by a conspiracy the recoverable damage is the difference between what he did realize and what he would have received but for the conspiracy. No further "acts" are required. 15 von Kalinowski, *Antitrust Laws and Trade Regulation* § 115.03[3] (1980), at 115-27, citing *American Crystal Sugar Co.* v. *Mandeville Island Farms*, 195 F.2d 622 (9th Cir. 1962). In a Section 2 case brought against purchasers who have monopolized in procurement, the same basic measure is applied. 15 von Kalinowski, *supra*, at 115-27, citing *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir. 1962), *cert. denied sub. nom. Wade* v. *Union Carbide & Carbon Corp.*, 371 U.S. 801 (1962).

The argument that the proof must show "unlawful" acts within the four-year damage period overlooks the rule that acts otherwise lawful are nonetheless actionable if carried out pursuant to the combination and conspiracy. This Court expressly rejected the defendants' argument in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 333 (1971), stating:

> . . . HRI contends, and the Court of Appeals held, that the statute permits the recovery only of those damages caused by overt acts committed during the four-year period. We do not agree.

The Court in *Zenith* went on to make clear that where there is a continuing conspiracy, a cause of action accrues to the plaintiff each time he is injured by it. *Id.* at 338-39.[6]

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[6] Here, the court has expressly found a continuing conspiracy through 1975. The law presumes, in any event, that violations of this nature continued in the absence of clear evidence of their termination. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 119 (1969). The defendants have relied largely on statute of limitations cases where a single act caused the injury. Such cases are not applicable here. *See Pioneer Co.* v. *Talon, Inc.*, 462 F.2d 1106, 1108-09 (8th Cir. 1972).

A plaintiff whose sale prices were restrained need not have any dealings with the defendants at all, *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948); and it is a sufficient "act" that the defendants continued their conspiratorial or monopolistic pattern of conduct. The "lessening of competition" is what gives rise to compensable injury. *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 128 (9th Cir. 1973). The court here has found that "[h]ad either defendant commenced to pay competitive log prices, the other would have been compelled to follow suit; but that did not occur." (FF XII.A.5, ER 2442.)

The same rule applies under Sherman Act § 2. Damages caused by an ongoing monopolization are recoverable although the acts whereby the defendants gained monopoly power occurred more than four years earlier. *Hanover Shoe* v. *United Shoe Mach. Corp.*, 392 U.S. 481 (1968). The Court there held that "although Hanover could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955." *Id.* at 502, n.15.[7]

C. Defendants Waived A Jury Trial And Affirmatively Sought A Trial To The Court

Although defendants now argue that they should have had a trial by jury, their position in the district court was the oppo-

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[7] *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), relied upon by defendants, does not support their position. The court there held that in a suit against a *pristine* monopolist—one whose market position was gained without taint of collusive or anticompetitive conduct—the recoverable damages were those which flowed from its recent anticompetitive practices. But the court also made clear that its holding would *not* apply where the monopoly power was attained in the first place through collusive or predatory practices. In that event, the measure of damages would remain as before: *i.e.*, the difference between what the plaintiff actually received (or paid) in the restrained market and what it would have experienced in a market free of the restraints. *Id.*, 603 F.2d at 297.

site until ALP attempted to reverse its field when defendants at last were faced with a trial date. Defendants waived a jury trial by moving to strike plaintiff's jury demand and insisting that the case be tried to the court. (SER 7-35.) Moreover, after plaintiff withdrew its jury demand in order to obtain a trial date, KPC expressly waived the jury demand to the same extent that plaintiff had waived it. (SER 63-64.) ALP filed a jury demand shortly before trial in 1980, more than five years after the action was commenced. (ER 346.) The court struck the belated demand pursuant to a memorandum decision. (ER 408-11.) Defendants did not seek interlocutory review of that order; instead, they proceeded to try the case to the court over the next several months.

Plaintiff demanded a jury at the outset in 1975. (ER 1, 15.) Neither defendant did so. In 1978, defendants moved to strike palintiff's jury demand. (SER 7-8.) ALP argues now that this motion applied to "a consolidated trial [of] the facts of five complex and diverse antitrust cases." (ALP Petition, p. 3). But defendants persisted in their motion to strike, and demanded a bench trial as to Reid Brothers alone, after this case had been designated for a separate trial. On August 30, 1978 Judge Sharp ruled in a written order that Reid Brothers "shall be the first case to be tried." (SER 36.) Several weeks later, KPC and ALP filed a joint reply memorandum again urging the court to strike the jury demand. (SER 38-45.) They pointed out that the court had ordered the Reid Brothers case to be tried first. (SER 39.) They argued that the case was too complex for a jury to understand and that they would be denied due process of law unless it were tried to the court. (SER 40-43.) A jury, they insisted, would be "an incompetent fact finder" in the Reid Brothers action. (SER 41.) They accused plaintiff of "banking on the inability of a jury to understand the issues . . ." (SER 40.) They added (SER 42):

> . . . The court's ruling separating the Reid Brothers case for trial first will alleviate but not overcome the concerns

> which prompted defendants' motion to strike the demand for jury.

On May 21, 1980, the court set the case for trial on July 28, 1980. At a pretrial conference on June 5, 1980, the district judge mentioned that the extreme calendar congestion in the district would make it more difficult to hold the trial date for a jury trial and asked that consideration be given to a bench trial. Plaintiff, which although it preferred a jury trial had waited over five years for its day in court and could wait no longer, responded with a letter waiving its jury demand as to a trial to commence in the summer of 1980.

KPC, in open court at the hearing held on June 5, 1980, expressly waived its rights, if any, to a jury trial, "to the same extent and only to the extent that Mr. Dwyer has waive[d] for the plaintiff in his letter to Your Honor . . ." (SER 64.) KPC did not condition its waiver on the position ALP might take one way or the other. Petitioners now argue that KPC "refused to consent to the withdrawal [of Reid Brothers' jury demand] unless all parties agreed." (ALP Petition, p. 4). That is simply not true. The defendants apparently are referring to a written statement filed by KPC on June 20, 1980 (CR 480), two weeks after it stipulated in open court to a bench trial. The record is clear that KPC expressly consented without qualification to the withdrawal of plaintiff's jury demand, and the court of appeals has correctly so noted. 699 F.2d at 1304. KPC is thus unquestionably bound by the result of the ensuing trial to the court.

ALP by a letter dated June 6, 1980, said it would not consent to a bench trial and that it demanded a jury. (ER 346.) The court on motion struck this untimely demand, finding that ALP had waived any right to a trial by jury and stating in part (ALP App. A-69-72):

> ALP argues that its motion to strike jury demand, filed on August 31, 1978, was based on the assumption that Judge Sharp intended to try the five timber cases together. ALP claims that its present change of position on the jury issue is based on events, mainly the decision to

try the Reid Brothers' case alone, that transpired after it filed its August 31 motion.

Upon review of the record, however, it is clear that ALP opposed plaintiff's jury demand both before and after defendant was told that the Reid Brothers' case would be tried apart from the remaining four timber cases. At a preliminary pretrial conference and by order on August 30, 1978, Judge Sharp informed the parties of his intention to segregate the trials. Defendants noted this development in their October 18, 1978, reply memorandum supporting their motion to strike jury demand, but nevertheless continued to emphatically persist in their position that a jury could not comprehend the complexities of this large antitrust case. *See* Defendants' Reply Memorandum Supporting Motion to Strike Jury Demand (October 18, 1978) at II-1—II-7. With knowledge that the Reid Brothers' case would be tried first, defendants stated that a jury would be an incompetent fact-finder because of (1) plaintiff's intention to "reach back to 1959" to find documentation supporting the allegations of conspiracy, (2) plaintiff's desire to introduce evidence of the circumstances surrounding the demise of the many independent loggers in Alaska, and (3) the complex accounting issues, timber terminology and government regulations that would be in issue in the case.

There has been no change in the posture of this case since defendants filed their reply memorandum in support of their motion to strike that would support ALP's contention that the issues have changed substantially. In his November 22, 1978, Order on Defendants' Summary Judgment Motions Judge Sharp denied all of defendants' motions pertaining to plaintiff Reid Brothers. At a preliminary pretrial conference on May 29, 1980, and by formal order issued on the same day, this Court denied defendants' Motion to Exclude Evidence Concerning the Circumstances Causing Ninety-Nine Other Loggers to Quit Business. Essentially, the same case that ALP repeatedly said should not or could not be tried to a jury is now ready for trial on July 28, 1980.

It is clear from the course of events that ALP has opposed plaintiff's jury demand both before and after defendant learned that the Reid Brothers' case would be tried apart from the other cases. There has been no development or

> change in circumstances in this case since defendants filed their reply memorandum in their motion to strike that would indicate that ALP's waiver of a trial by jury was anything but knowledgeable and intentional.
>
> ALP has not withheld its jury demand in reliance upon the demand filed by another party. To the contrary, ALP has clearly and steadfastly expressed its desire to have this case tried to the Court. Rule 38(d) does not prevent this Court from finding that ALP has waived its right to a jury trial.

Under Fed. R. Civ. P. Rule 38(d), a party who fails to make a timely demand waives trial by jury. The provision that a jury demand once made may not be withdrawn without consent is designed to allow parties to rely upon jury demands filed by their opponents. *DePinto* v. *Provident Security Life Insurance Company*, 323 F.2d 826, 832 (9th Cir. 1963); *Thomas* v. *Peninsular & Oriental Steam Navigation Company*, 246 F. Supp. 492, 594 (E.D. Pa. 1965). But here it is manifest, and the court found, that ALP did not rely upon plaintiff's jury demand; to the contrary, it bent every effort to defeat that demand, even claiming a violation of its constitutional rights if the case were not tried to the court. (ER 409.)

Under Rule 38 a jury trial may be waived even through inadvertence. 9 Wright & Miller, *Federal Practice & Procedure* § 2321, p. 102; *Chandler Supply Co.* v. *GAF Corp.*, 650 F.2d 983, 987 (9th Cir. 1980). No special form is required, and waiver may be found in the conduct of the parties. 9 Wright & Miller, *supra*, § 2321, p. 102; *Palmer* v. *United States*, 652 F.2d 893, 896 (9th Cir. 1981). Waiver can also be accomplished by an oral statement of counsel. *West* v. *Devitt*, 311 F.2d 787, 788 (8th Cir. 1963); *Country (Social) Club of Savannah, Inc.* v. *Sutherland*, 411 F.2d 599, 600 (5th Cir. 1969). Once a waiver has been made, it cannot be set aside because of the party's later change of mind. *West* v. *Devitt*, *supra*. Even the kind of unintentional waiver specified in Rule 38(d)—failure to file a written demand for a jury within ten days after the issue has been joined—is irrevocable. 9 *Wright & Miller*, *supra*, § 2321, p. 102.

The cases cited by petitioners are inapposite. For example, in *DePinto* v. *Provident Security Life Ins. Co.*, 323 F.2d 826, 832 (9th Cir. 1963), the court noted that the failure to file a jury demand "does not constitute a waiver if such demand is withheld in reliance upon a demand filed by another party. . . ." The party in *DePinto* had not filed express and repeated written waivers, as defendants did here. In *Palmer* v. *United States*, *supra*, the court held that plaintiff's silence after having properly made a jury demand did not constitute a waiver, whereas active conduct of the parties could constitute a waiver. *Id.* at 896. *Rosen* v. *Dick*, 639 F.2d 82, 92 (2d Cir. 1980) is not in point and merely confirms that reliance by the non-demanding party upon its opponent's jury demand, totally absent here, is required.

Both petitioners here repeatedly demanded a bench trial in the very case which in fact went to trial. The court of appeals correctly affirmed the district court's ruling. 699 F.2d at 1303-05.

CONCLUSION

For the reasons stated above and in respondent's brief in opposition in No. 83-307, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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